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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent, Rosa Charles, files this brief in opposition to the granting of a writ of certiorari sought by the Norfolk & Western Railway Company to the judgment of the United States Court of Appeals for the Seventh Circuit entered herein on the 12th day of March, 1951.

PRELIMINARY STATEMENT.

The statement of the petitioner is inaccurate and incomplete. We shall supplement the statement with facts taken solely from the testimony of defense witnesses, and a few uncontradicted facts of respondent.

The head brakeman, Coombs, talked to conductor Ireson about respondent at Bluefield, West Virgina (Tr. 125). Conductor, Ireson, then went to respondent and asked her to move into the head coach. Answer, conductor: she says, "I bought my ticket, and I am not going to move", I said, "All right, I'll have you moved when I get to Roanoke" (Tr. 127). The conductor wired the superintendent, the special officer (Keister) and the station master at Roanoke about the respondent (Tr. 141). The conductor was in the coach by the respondent five times and she was a perfect lady each time he was in there (Tr. 139-140). (Police Officer F. S. Copenhauer, a defense witness). The respondent was a perfect lady at all times (Tr. 175). When the respondent was locked up in jail, she could have been carried into court and tried immediately (Tr. 182-3). Q. "So the judge was there, the clerk was there, the witnesses were there and the prisoner was there, and they didn't try her; that's right, isn't it?" A. "Yes sir". (Tr. 184).

"The police did not give respondent any food and refused her request to contact her people for her." (Tr. 184-5).

Mr. Ferguson objected to certain exhibits concerning the trial in Roanoke.

The Court: "One thing I can't understand is why, if she could only be fined Twenty-five Dollars ($25.00), why she had to have Three Hundred Dollars ($300.00) bond. That is one thing I cannot understand." Mr. White, "Well, the record shows Two Hundred Fifty-one Dollars ($251.00)" (Tr. 189). The Court: "Well, why should she have to have Two Hundred Fifty-one Dollars ($251.00) bond if the maximum for the offense could only be Twenty-five Dollars ($25.00)?"

The Court: "You can't infer anything else but that they were pushing the young woman around. That's all. They wanted to keep her in jail until Monday over the weekend."

(Head brakeman A. R. Coombs, defense witness): Mr. Coombs requested the respondent to move into the separate coach for colored passengers three times and she did not answer him. He reported the matter to the conductor (Tr. 194-95, 204-5). Mr. Coombs pointed the respondent out to special officer Keister and a military policeman and saw her fighting the two officers when they took her out on the platform (Tr. 196). Mr. Coombs weighed 165 or 170 pounds.

(Special Officer Keister, defense witness.) Officer Keister has been employed by the petitioner 15 years (Tr. 210). He was directed to the train and the coach in which respondent was riding by R. L. Sprawling, station master, (Tr. 212), and went to respondent and asked her to move into a separate coach for colored passengers. She refused and he caught her by the arm and asked a military policeman to assist him with her to the other car, and she began fighting and they took her off the train and had one of the clerks to call the police patrol (Tr. 214). She was taken to the police station and officer Keister placed charges against her in ten minutes (Tr. 216-17). Officer Keister weighed 230 pounds (Tr. 218).

There were about 50 passengers in the coach with respondent, both ladies and men. The officer did not say anything to any passenger, woman or man, except respondent. He did not pick up or attempt to pick up any lady's coat or wrap, other than respondent's. He did not ask any lady to move or catch her by the arm, other than respondent. (Tr. 219).

He went to respondent and asked her to move because she was colored. Had she been a white lady, he would not have bothered her or asked her to move. He would not have caught her by the arm or placed charges against her. The sole and only reason he placed charges against respondent was because she was a colored woman riding in a coach with white people. If she had not been riding in a coach with white people, he would not have bothered her. (Tr. 220).

Uncontroverted evidence by respondent: The respondent was imprisoned from 10:00 o'clock a.m., until 10:00 o'clock p.m. (Tr. 39). She gave the janitor Ten Dollars ($10.00) to send her a lawyer and gave the lawyer Ten Dollars ($10.00) to wire her people in Chicago for Three Hundred Dollars ($300.00) bond money. Her mother-in-law wired her Three Hundred Dollars ($300.00) from Chicago for bail. (Tr. 40).

Opinion Below.

Opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 188 Federal 2nd 691, and set out on pages 280-286 of the record, as stated in the petition.

Jurisdiction.

The jurisdiction of this court under section 1254, paragraph (1) of Title 28, United States Code, is conceded.

Reasons Why Writ Should Not Be Granted.

The court having declared the Virginia Statute upon which the petitioner based its defense and the regulations of petitioner absolutely null and void and two courts having found against petitioner on the question of agency and the trial court having found against petitioner on the questions of the statute of limitations and *res adjudicata,* and all such defenses having been abandoned by the petitioner, leaves it without any defense whatsoever in this court.

There is no important or unsettled question of federal law involved with respect to the reversal of the judgment. There is no conflict between the decision of the Court of Appeals and applicable decisions and rules of practice and procedure of this Court. Neither of these grounds exist.

A common carrier of an interstate passenger can subject such passenger only to such rules and regulations as are valid and applicable to all other members of the traveling public. Any rule or regulation which violates this fundamental principle and subjects an interstate passenger to different treatment because of an arbitrary illegal classification on the basis of color pursuant to a state statute or custom or practice in that state, is null and void and subjects the carrier to absolute liability and damages.

BRIEF.

I.

The Virginia statute relied upon in petitioner's answer as amended is unconstitutional and void, and the regulations set forth in said answer are void.

Morgan v. *Virginia,* 328 U. S. 373

Matthews v. *Southern Ry. System,* 157 Fed. 2d 609

Chance v. *Lambeth et al.,* 186 Fed. 2nd 879

Whiteside v. *Southern Bus Lines,* 177 Fed. 2d 949

Lee v. *Com.,* 189 Va. 890

Taylor v. *Com.,* 187 Va. 214, 218

II.

There is not a single question of fact presented to this Court. The Circuit Court of Appeals passed solely upon questions of law.

Shearer v. *Porter,* 155 Fed. 2d 77, 81

Atlantic Refining Co. v. *Forrester,* 25 Atl. 2d 667, 670

Cousins v. *Sovereign Camp W.O.W.,* 35 S.W. 2d 696, 699

Krepcik v. *Interstate Transit Lines,* 38 N.E. 2d 553, 537

Willard v. *Zehr,* 251 Ill. 148, 154

Washington v. *L. & N. Ry. Co.,* 136 Ill. 49, 52

III.

The liability of the petitioner for damages in the case at bar is absolute.

Matthews v. *Southern Ry. System,* 157 Fed. 2d 609

Chance v. *Lambeth, et al.,* 186 Fed. 2d 879

Whiteside v. *Southern Bus Lines,* 177 Fed. 2d 949

Chicago and Eastern Ry. Co. v. *Flexman,* 103 Ill. 546, 550-1.

Layne v. *Ry. Co.,* 66 W. Va. 607

Gillingham v. *Ohio River Ry. Co.,* 35 W. Va. 588, 592, 598

Eichengreen v. *Ry.,* 96 Tenn. 229

IV.

Where the cumulative effect of the errors prejudice the substantial rights of the losing party, the verdict and judgment thereon cannot stand.

Kotteakos v. *United States,* 328 U.S. 750

United States v. *Donnelly,* 179 Fed. 2d 227, 233

Rosa Charles v. *Norfolk and Western Ry. Co.,* 188 Fed. 2d 691

V.

Petitioner's instruction number 33 placed upon respondent an illegal burden of proof and erroneously withdrew from the consideration of the jury two proven grounds of recovery.

Weber Wagon Co. v. *Kehl,* 139 Ill. 644, 656-7

Devine v. *Delano,* 272 Ill. 166, 174

Gillingham v. *Ohio River RR Co.,* 35 W. Va. 588

Eichengreen v. *Railroad,* 96 Tenn. 229.

VI.

A valid defense cannot be sustained under an unconstitutional statute.

Norton v. *Shelby County,* 118 U.S. 427, 442

Chicago Ind. and L. Ry. Co. v. *Hackett,* 228 U.S. 559, 566

Com. v. *Malco-Memphis Theatre,* 169 S.W. 2d 596, 598

Allen v. *Holbrook,* 135 P. 2d, 242, 246

Minnesota Sugar Co. v. *Iverson,* 91 Minn. 30, 40

VII.

The petitioner having acted under a void statute, its liability to respond in substantial damages is absolute.

Sumner, et al. v. *Beeler,* 50 Ind. 341, 342

Chenango Bridge Co. v. *Paige, et al.,* 83 N.Y. 178, 190

Chapman v. *Selover,* 159 N.Y.S. 632, 636

ARGUMENT.

The petitioner has not shown that the Circuit Court of Appeals reversed the judgment upon errors of fact and has not shown that the Opinion of the Circuit Court of Appeals is upon an important federal question, which has not been settled by this court. The petitioner does not contend that the verdict of the jury and the decision of the trial court are just and correct.

I.

In the case of *Morgan* v. *Virginia,* 328 U.S. 373, this court held the Virginia statute, relied upon by the petitioner in its answer, requiring the separation of interstate white and colored passengers within the state of Virginia to be an unlawful burden upon interstate commerce and null and void.

This decision was followed in *Matthews* v. *Southern Railway System,* 157 Fed. 2d, 609; *Chance* v. *Lambeth,* 186 Fed. 2d, 879; *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d, 949; *Lee* v. *Commonwealth,* 189 Va. 890, and *Taylor* v. *Commonwealth,* 187 Va. 214.

In the case of *Chance* v. *Lambeth, et al.,* 186 Fed. 2d, 879, 881-2, the Circuit Court of Appeals held that the regulations of a carrier requiring the separation of white and colored interstate passengers were unconstitutional regulations and void. The same principles were laid down by the court in *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d. 949, and *Taylor* v. *Commonwealth,* 187 Va. 214.

Every defense pleaded by the petitioner in its answer as the same was amended has been passed upon by the Court adversely to the petitioner and has been abandoned by the petitioner. The petitioner comes before this Court in the peculiar position of not contending that it has a defense, but asserting the inherent impotency of the Court to reverse the trial court and order a new trial, where justice has not been done and serious errors of law were committed in the trial of the cause as pointed out in the opinion of the Circuit Court of Appeals.

II.

There is not a single question of fact presented to this court. The Circuit Court of Appeals passed solely upon questions of law. The petitioner has not pointed to a single controverted or contested fact involved in the opinion of the Circuit Court of Appeals. The petitioner has not cited a single case involving the applicable principles of law herein, where a Circuit Court of Appeals has held to the contrary. In the case of *Shearer* v. *Porter*, 155 Fed. 2d, 77, 81, the Court said:

> "On the present record, we must hold that there was no question for the jury on whether overcharges had been made under the Regulation, or of their amount. The evidence unequivocally established those facts as a matter of law."

In the case of *Atlantic Refining Company* v. *Forrester*, 25 Atl. 2d, 667, 670, the Court said:

> "But, in cases where the facts are agreed upon, or proved without contradiction, and there is no dispute as to any material inference of fact, the court may decide the issue as one of law. *Harrison* v. *Central Construction Co.*, 135 Md. 170, 180, 108 A. 874; *Beasman* v. *Butler*, 133 Md. 382, 387, 105 A. 409; *Schemmel* v. *T. B. Gatch & Sons, etc., Co.*, 164 Md. 671, at page 675, 166 A. 39."

In the case of *Cousins* v. *Sovereign Camp W.O.W.*, 35 S.W. 2nd 696, 699, the Supreme Court of Texas said:

> "This is no dispute in the entire record of the fact that the defendant in error is incorporated and exists under the laws of the state of Nebraska and has its principal place of business in that state. Hence, the finding of the trial court with reference to its residence must be treated as a conclusion of law, as it was doubtless intended; but, in any event, a finding of fact based upon undisputed evidence is an issue of law and is within the jurisdiction of this court. *Texas Loan Agency* v. *Fleming*, 92 Tex. 458, 49, S.W. 1039, 44 L.R.A. 279."

In the case of *Willard* v. *Zehr*, 215 Ill. 148, 154, the Supreme Court of Illinois said:

> "Whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other they are said to be at an issue, and when a material fact is thus affirmed and denied an issue of fact is formed for trial, and its determination usually results in a judgment for one party or the other."

III.

The liability of the petitioner to the respondent for damages is absolute. The evidence considered by the Circuit Court of Appeals and set forth herein is positive uncontradicted evidence. There is no conflict in the evidence requiring a determination of the credibility of witnesses or the rejection of evidence. It is a matter of applying the applicable principles of law of carrier and passenger to undisputed facts given in evidence by the defendant's own witnesses.

In the case of *Matthews* v. *Southern Railway System*, 157 Fed. 2d 609, the plaintiffs, colored interstate pas-

sengers, refused to move into the car reserved for colored passengers and the conductor pointed the plaintiffs out at Lynchburg, Virginia, to a police officer who requested the plaintiffs to move into the other car and they refused. The agents of the road and the police officer claimed to act pursuant to the Virginia statute which requires the separation of white and colored passengers in public conveyances. The plaintiffs were removed from the train. The facts were not disputed. The lower court found the defendant not guilty. The Court of Appeals reversed the decision and held that the carrier was liable and that it was required to protect its passengers against assault and interference until they had peacefully completed their journey.

In the case of *Chance* v. *Lambeth, et al.,* 186 Fed. 2d 879, the plaintiff, an interstate colored passenger, was ejected from the defendant's train and arrested because of his color. The defendant relied upon its regulations requiring the separation of white and colored passengers. The Court directed a verdict for the plaintiff upon the illegal arrest only. There was no conflict in the evidence. The jury returned a verdict of Fifty ($50.00) Dollars. The Circuit Court of Appeals reversed the case upon the ground that damages were assessed upon the wrong theory. The Circuit Court of Appeals said the liability of the defendant was absolute. The defendant petitioned this Court for Certiorari and Certiorari was denied on May 28, 1951, in 341 U.S. 941. The case of *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d 949, was a similar case and the court held that the liability of the bus lines was absolute.

In the case of *Gillingham* v. *Ohio River RR Co.,* 35 W. Va. 588, the conductor called police officers and mis-

takenly pointed out the plaintiff as the man who had assaulted and cut him with a knife. The Court held that the company was obligated to protect its passengers against any injury from negligence or wilful misconduct of its servants while performing the contract of carriage and protect them from assaults by fellow passengers and strangers so far as practicable; that the obligations continued as long as the contract of carriage was being performed; the modern doctrine is well-settled, that which the superior has put the inferior in motion to do, must be regarded as done by the superior himself and his responsibility is the same as if he had done it in person; that these principles covered acts of omission as well as commission; that where a conductor wrongfully evicts a passenger from the train, the liability of the company is unquestionable and that principle applied to such acts as assault and battery.

In the case of *Chicago & Eastern R. R. Co.* v. *Flexman,* 103 Ill. 546, 550-1, the Supreme Court of Illinois, quoting from *Goddard* v. *Grand Trunk Ry. Co.,* 57 Me. 202, said:

> "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of passengers, but, *a fortiori,* against the violence and insults of his own servants. If this duty to the passenger is not performed,—if this protection is not furnished,—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible."

In the case of *Layne* v. *Railway Compwany,* 66 W. Va. 607, plaintiff's intestate was shot and killed by a special

officer of a detective agency. The court held that the officer was rendering service for the company and that the company was liable for the tortious acts of its servants even though wilful and maliciously done within the scope of their employment, and further held that the act of the officer breached the contract of carriage to protect the passengers from all tortious acts of its servants, and that the breach however occasioned, made the company liable to the passenger; that liability does not depend upon whether the servant acted as the carrier's agent in inflicting the injury, but whether or not the carrier has broken its contract for safe carriage of passengers.

In the case of *Eichengreen* v. *R.R.*, 96 Tenn. 229, a special officer employed by the road in Kentucky sent a telegram to the police in Gallatin, Tennessee, to arrest the plaintiff for attempting to pass counterfeit money. The plaintiff was arrested pursuant to the telegram and recovered a judgment for One Dollar. The case was reversed on appeal. The Court held that the special officer was employed by the defendant to protect its property and to ferret out and prosecute parties committing crimes against the property of the defendant and was liable.

IV.

The judgment of the Circuit Court of Appeals is correct. That court held (1) that considering the exceptional nature of this case in which the uncontradicted evidence showed the absolute liability of petitioner; and the entire record showed that justice had not been done; (2) that instruction No. 33 was wrong in application to the proof made and the error pervaded the entire charge to the jury and the record and deprived respondent of two

proven grounds of recovery by uncontradicted evidence, and deprived the jury of freedom of judgment and compelled a verdict for petitioner, which prejudiced the substantial rights of respondent. *Kotteakos* v. *United States,* 328 U.S. 750, 762 and 768.

The petitioner has not cited a single case holding contrary to the Circuit Court of Appeals in the instant case on applicable principles of law. Every case cited by petitioner involved highly conflicting evidence in support of a legal defense interposed and urged. In this Court, no defense is claimed in the petition and not a single fact is pointed out which tends to support the verdict. The petition is general and abounds in hidden presumptions. It considered everything in the abstract and nothing in particular. There are not even abstract similarities between the cases cited by petitioner and the facts and circumstances in the instant case.

In the case of *United States* v. *Donnelly,* 179 Fed. 2d 227, 233, the court said:

> "The question before us is: What effect did the errors hereinbefore described have, or what effect may they reasonably have had, upon the jury's decision, *Kotteakos et al.* v. *United States,* 328 U.S. 750, 763, 66 S. Ct. 1239, 90 L. Ed. 1557. This was a close case, depending largely on the credibility given to the testimony of an alleged accomplice. In *Berger* v. *United States,* 295 U.S. 78, 89, 55 S. Ct. 629, 79 L. Ed. 1314, the Supreme Court characterized the case against Berger for conspiracy as 'weak', depending as it did upon the testimony of Katz, an accomplice. We feel the errors were not harmless, Rule 52, Federal Rules of Criminal Procedure; *Bollenbach* v. *United States, supra; Bihn* v. *United States,* 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485, and conclude that their cumulative effect was to

prejudice substantial rights of the defendant, to the end that the judgment of guilty herein cannot be sustained."

V.

Petitioner's instruction No. 33 placed upon respondent an illegal burden of proof and erroneously withdrew from the consideration of the jury two proven grounds of recovery. Petitioner contends that instruction No. 33 was not objected to. On page 244 of the transcript, the court held the instruction proper and the record shows a discussion on that instruction. The official reporter did not take down the specific objections. The objections were verified by the Court on motion for a new trial.

> Mr. Ferguson: "Your Honor, you remember that I objected to this instruction."
>
> The Court: "Oh, of course you did".
>
> There was discussion and Mr. Ferguson said: "No, your Honor, but, if your Honor remembers, I objected on the ground that—"
>
> Mr. Ferguson was cut off by the Court. The Court said: "Oh, well, I know you objected. I remember the whole story". (Tr. 255).

Paragraph 6 of the Amended Complaint alleged that the conductor, a detective employed by the defendant and a military policeman called by the conductor committed the acts complained of.

Paragraph 7 of the Amended Complaint alleged that the defendant then and there with great force and arms assaulted and beat the plaintiff and committed all of the other acts complained of. (Tr. 10 and 11.)

Paragraph 9 of the Amended Complaint stated that the defendant caused and procured the commission of the acts complained of.

Paragraph No. 10 alleged that the acts were committed by the defendant with malice.

This instruction placed upon the respondent an illegal burden of proof and directed the verdict against the causes of action stated in paragraphs 7 and 9 and wholly withdrew them from the consideration of the jury.

In the case of *Weber Wagon Co.* v. *Kehl,* 139 Ill. 644, 656, the Supreme Court of Illinois said:

> "The plaintiff had the right to aver in his declaration as many grounds of recovery as he saw proper, but it was not necessary to prove all that was alleged. It was sufficient to prove enough of the negligence charged to make out a case."

In the case at bar the causes of action set forth in paragraphs 7 and 9 allege that the defendant committed the acts complained of.

In the case of *Chicago Grand Trunk Ry. Co.* v. *Spurney,* 197 Ill. 471, 473, the Supreme Court of Illinois said:

> "Where a tort is averred and the substance of the allegation is proved, a variance is not material if the opposite party has not been misled."

On page 477, the Court, quoting from Chitty on pleadings, said:

> "In torts, the plaintiff may prove a part of his charge if the averment is divisible and there be enough proved to support his case."

In the case of *Devine* v. *Delano,* 272 Ill. 166, 174, the Supreme Court of Illinois said:

> "Where there are two charges of negligence in the declaration, the rule is that proof of either one of the charges is sufficient to warrant a recovery, provided the negligence is shown to be the proximate cause of the injury; (*Chicago and Grand Trunk Rail-*

way Co. v. *Spurney,* 197 Ill. 471; *Weber Wagon Co.* v. *Kehl,* 139 id. 644;) and this even though the two charges of negligence are joined or coupled together as they are in each count of this case."

VI.

A void statute and void regulations of petitioner cannot protect it from liability.

In the case of *Norton* v. *Shelby County,* 118 U.S. 427, 442, this Court said:

> "An unconstitutional act is not law; it confers no rights; It imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

We find the same principles laid down in *Chicago, Indiana & L. Ry. Co.* v. *Hackett,* 228 U.S. 559, 566; *Comm.* v. *Malco-Memphis Theater,* 169 S.W. 2d 569, 598; *Allen* v. *Holbrook,* 135 P. 2d 242, 246, and *Minn. Sugar Co.* v. *Iverson,* 91 Minn. 30, 40.

VII.

The petitioner acted at its peril in committing the acts shown by the uncontradicted evidence and its own evidence herein. It cannot avoid paying substantial damages to respondent on such evidence. In the case of *Summer, et al.* v. *Beeler,* 50 Ind. 341, 342, the Court said:

> "No question in law is better settled, and this is admitted by the counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences."

In the case of *Chenango Bridge Company* v. *Paige, et al.* 83 N.Y. 178, 190-2, the defendant built a bridge and used it as a toll bridge pursuant to an act of the legislature which was unconstitutional. The plaintiff, another toll bridge owner, had exclusive rights to operate such a bridge, and sued the defendant for damages. The Court of Appeals of New York held the defendant liable for the full amount of the tolls collected.

In the case of *Chapman* v. *Sellover,* 159 N.Y.S. 632, the plaintiff sued for damages for false imprisonment and assault and battery committed pursuant to a void ordinance. On page 636, the Court said:

> "Under these circumstances it seems clear that the learned trial judge was in error in instructing the jury in effect that the ordinance was a protection to defendant in making the arrest, if he used no more force than was necessary. Even if plaintiff had violated some other law and was actually guilty of a crime, the arrest which defendant made for violating the ordinance could not be justified by showing plaintiff's guilt of such other crime. *Snead* v. *Bonnoil,* 166 N.Y. 325, 59 N.E. 899.
>
> We are also of opinion that the trial court was in error in ruling that the complaint stated a cause of action for assault only, and not for false imprisonment."

CONCLUSION.

No grounds appear which warrant the granting of the Writ in this case. Although, petitioner has attacked the judgment of the Circuit Court of Appeals of the Seventh Circuit, that Court did not depart from the applicable decisions of this court, and its holding finds support in the decisions of other state and federal courts cited herein. There is involved no unsettled principles of law having wide application. This Court passed upon the con-

trolling question involved herein on May 28, 1951, when it denied certiorari in *Chance* v. *Atlantic Coast Lines,* 341 U.S. 941. There is no important question in this case requiring an additional definitive expression of this Court.

Since the facts re-examined and considered by the Circuit Court of Appeals of the Seventh Circuit were uncontradicted, and facts given by defense witnesses only, a question arose as to the applicable principles of substantive law, which the Circuit Court of Appeals decided.

The Circuit Court of Appeals re-examined the facts to determine the applicable principles of law and did not reverse the case on any question of fact, but solely on questions of law.

The Circuit Court of Appeals considered the legal effect, under the applicable principles of law, of the undisputed evidence and the defendants' own evidence, which raised questions of law as clearly as the admitted fact by a plaintiff that he failed to stop, look and listen before entering upon a railroad crossing.

We respectfully contend that the petitioner discussed only principles of law applicable to cases on appeal, where legal defenses were interposed and urged and the evidence before the Circuit Court of Appeals was conflicting. Therefore, the entire argument of petitioner is inapplicable to the instant case, and certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

EDWARD R. ADAMS,
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REPLY BRIEF FOR PETITIONER.

Since we deem the points made by plaintiff and respondent in her brief irrelevant and not proper for the consideration of this Court, we shall not answer plaintiff's brief *seriatim.*

I.

THE AMENDED COMPLAINT CHARGES THE DEFENDANT WITH MALICE. THE CASE WAS TRIED ON THE THEORY OF MALICE. THE JURY FOUND THE DEFENDANT NOT GUILTY OF MALICE AND PLAINTIFF'S MOTION FOR A NEW TRIAL WAS OVERRULED. UNDER SETTLED LAW NEITHER THE COURT OF APPEALS NOR THIS COURT CAN RETRY THE FACTS FOUND BY THE JURY AND GRANT PLAINTIFF ANOTHER TRIAL ON A DIFFERENT THEORY.

The amended complaint consists of one count (R. 9-12). It charges the defendant with *malice*. Despite the effort of plaintiff's attorneys to separate that complaint into several charges the combined effect of all such charges is *malice*—that whatever the defendant did was *maliciously* done. Paragraph 10 of said complaint avers: "That all of the aforesaid acts committed by said defendant were malicious and in disregard of plaintiff's rights and done for the specific purpose of injuring plaintiff; that malice is the gist of this action" (R. 12).

In *Kitson* v. *Farwell, et al.*, 132 Ill. 327, the Supreme Court of Illinois said at page 338:

> "* * * The gist of an action is defined to be, the cause for which an action will lie; the ground or foundation of a suit, and without which it would not be maintainable; the essential ground or object of a suit, without which it is not a cause of action. * * *"

The very essence of plaintiff's complaint is *malice*. It is elementary that a cause of action is limited by the allegations of the complaint and it is likewise elementary that the issues are made by the pleadings. The defendant, by its answer, *denied* the charges of *malice* (R. 13-17). The issue was therefore squarely made: *Was the defendant guilty of malice?* The case was tried on the theory of *malice*. The jury by its verdict of not guilty said that the defendant was *not guilty of malice*. The jury may well

have believed that plaintiff sought to make trouble and that whatever the defendant's employees did was done pursuant to the regulations of the defendant then in effect. The trial judge gave plaintiff every opportunity to prove her case. Although personally sympathetic to her, he did not feel that in the exercise of his duties as a judge, he was justified in granting her motion for a new trial in view of the evidence and the jury's verdict. The trial judge recognized that there was *substantial evidence in support of the defendant's position that it did not act maliciously.*

The Court of Appeals granted plaintiff a new trial because it felt that had she not relied on *malice,* she might have recovered on charges of what it denominates as simple assault, false arrest and imprisonment. *Under settled law,* plaintiff is not entitled to another trial. Her attorneys chose the theory on which they would bring suit on her behalf. She has had a trial of the facts on such theory and the jury found against her. *Under settled law she is not entitled to another trial on a different theory.* If every litigant who brought an action on a certain theory and lost were given an opportunity to try the action on some other theory, litigation would be endless. As shown in the petition for certiorari, an order overruling a motion for a new trial is neither appealable nor reviewable, except in those instances where the trial court mistakenly assumed it had no jurisdiction to consider the motion or where it excluded material pertinent to said motion, neither of which grounds exist on this record. This Court has so held many times; likewise the several courts of appeal.

The Court of Appeals was clearly in error in granting plaintiff a new trial on the stated ground that it thought the plaintiff could have recovered on another theory. In *Thomas, et al.* v. *Taylor,* 224 U. S. 73, which was an action against directors of a national bank for attesting a

false report of the condition of the bank, it was argued that if the defendants could have defended to a charge of a violation of the national bank act, instead of to an action for deceit, they would have been able to make a showing under which they would have been acquitted. This Court said at page 82:

> "Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result. * * *"

So in the case at bar it necessarily follows that plaintiff is not entitled to a new trial merely for the opportunity of bringing her action on some other theory.

The ground upon which the Court of Appeals gave plaintiff a new trial was never suggested to nor passed upon by the District Court, nor was it advanced on appeal. As said by the Court of Appeals in *World Fire & Marine Insurance Company* v. *Carolina Mills Distributing Company* (CA, 8th Cir.), 169 Fed. 2d 826, at page 829:

> "* * * it is undesirable that an appellate court determine a cause upon a theory or issue which has neither been considered by a trial court nor advanced by either of the litigants. * * *"

In *Meloon* v. *Davis* (CA, 1st Cir.), 292 Fed. 82, it was argued that the evidence showed that the defendant was guilty of wanton and reckless misconduct in addition to the finding by the jury that he failed to exercise ordinary care. The Court of Appeals said at page 87:

> "* * * Whether, under the circumstances presented by the evidence, the defendant was guilty of wanton or reckless misconduct was a question of fact which the plaintiff could have had submitted to the jury, but did not. This not having been done, the verdict cannot be sustained on that theory of the law. * * *"

In *Witiak* v. *Delaware & Hudson Railroad Corporation* (CA, 3rd Cir.), 153 Fed. 2d 379, the Court of Appeals said at page 381:

> "Appellant strongly urges that wanton negligence on the part of the defendant would eliminate the question of decedent's contributory negligence. The principle so stressed is correctly stated. (Citing authorities.) The difficulty at this time is that under the present complaint the question of defendant's reckless disregard for the decedent's safety is not raised. The proposition was never suggested to or passed upon by the District Court but entirely aside from that, the whole rationale of the complaint is one of simple negligence for specified compensatory damages."

The holding of all of these cases is clearly to the effect that a party litigant is bound by the choice he has made. He cannot elect to sue upon one theory and then when he has gambled and lost seek to invoke another theory upon which to sustain recovery.

II.

PLAINTIFF CANNOT RETRY THE MERITS OF THE CONTROVERSY IN THIS COURT.

A.

She Was Not In a Position to Challenge the Sufficiency of the Evidence to Support the Verdict in the Court of Appeals and Cannot Do So In this Court.

The whole argument of plaintiff's attorneys in answer to the petition for a writ of certiorari is evasive and irrelevant. They seek to reargue and retry the merits. This they cannot do. *Plaintiff made no motion for a directed verdict.* She was, therefore, in no position in the Court of Appeals to challenge the sufficiency of the evidence to support the verdict. She cannot do so in this Court.

In *Harnik* v. *Lilley* (CA, 8th Cir.), 167 Fed. 2d 159, the Court of Appeals said at page 160:

> "This is an appellate court and we are without authority on appeal to set aside a general verdict because against the weight of the evidence. The only review that can be had as to the finding of fact by a jury is whether there is any substantial evidence to support it, this being a pure question of law. *When, however, there is no request for a directed verdict, the question as to the sufficiency of the evidence to sustain the verdict or judgment is not reviewable.* Amendment VII of the Federal Constitution provides, among other things, that, 'The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'
>
> "The only mode known to the common law to re-examine facts tried by a jury was the granting of a new trial by the court where the issue was tried. *This being a law action, we have appellate jurisdiction only, and the only way of securing a review of the facts is by interposing a motion for a directed verdict at the close of all the evidence and securing a ruling thereon. This presents a question of law.* * * *"

In *Emanuel* v. *Kansas City Title & Trust Company, et al.* (CA, 8th Cir.), 127 Fed. 2d 175, an action was brought for damages for breach of an escrow agreement. The issues were tried and submitted to a jury, which rendered a verdict for the defendant. After plaintiff's motion for a new trial was denied, he appealed from the judgment entered upon the verdict. At page 176 the Court of Appeals said:

> "It is necessary first to determine what questions are before this court. *The plaintiff challenges the sufficiency of the evidence to support the judgment for the defendant. He made no motion for a directed verdict.* * * * *But if the plaintiff intended to appeal in case the verdict went against him and to challenge the sufficiency of the evidence to support a judgment*

for the defendant, it was essential that he request the trial court to direct the jury to return a verdict in his favor and that he secure from that court a ruling upon his request. In the absence of such a request and ruling, the question of the sufficiency of the evidence to support the verdict and judgment is not subject to review by this court. * * * This court is a court of review and is without jurisdiction to retry an action such as this and to enter the judgment which it thinks should have been entered in the trial court. * * * We are therefore precluded from concerning ourselves with the question of the sufficiency of the evidence to support the judgment." (Italics supplied.)

In Barron and Holtzoff's Federal Practice and Procedure, Rules Edition, Volume 2, it is said at page 781:

"It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court. There are sound reasons for this rule. The party who makes no motion for a directed verdict must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the court for sharing that view. The appellate court, therefore, is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict. * * *"

B.

It Is Not the Practice of the Court of Appeals and This Court to Review the Facts, Weigh the Evidence and Pass On the Credibility of the Witnesses.

Even if plaintiff had made a motion for a directed verdict this court would not review the facts, weigh the conflicting evidence and pass on the credibility of the witnesses. In *Lavender, Admr., etc.* v. *Kurn, et al.*, 327 U. S. 645, this court said at page 652:

> "* * * The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. * * *"

In *Gunning* v. *Cooley,* 281 U. S. 90, this court said at page 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. * * *"

III.

THE COURT OF APPEALS GRANTED PLAINTIFF A NEW TRIAL FOR ALLEGED ERROR OF FACT. UNDER THE DECISIONS OF THIS COURT AND THOSE OF THE COURTS OF APPEAL OF THE SEVERAL CIRCUITS, NO REVIEW OF AN ORDER DENYING A MOTION FOR NEW TRIAL FOR ALLEGED ERROR OF FACT IS PERMITTED.

It is clear beyond question both from the explicit allegations of the complaint and from plaintiff's testimony that both she and her attorneys were mistakenly imbued with the idea that she had been *maliciously mistreated.* She wasn't content to bring a simple action for being wrongfully ejected from the train. She desired the punitive damages incident to malicious action on the part of defendant. That is what she alleged as her *one* and *only* cause of action. *Her testimony was to that effect, and her case was tried on that sole theory.* It is clear from the jury's verdict that the jury didn't believe that she was telling the truth, and did believe, from all the evidence, that there had been no malice in the conduct of the defendant or its servants.

Indeed, the issue in the case being what it was, and a

jury having found against the plaintiff, it would have been highly improper for the trial judge to have granted a new trial; and under settled law the Court of Appeals has no right to do so.

On this record it is clear that the verdict was not based on the Virginia Statute requiring the separation of interstate white and colored passengers within the State of Virginia because the trial judge told the jury there was no such valid law during the trial (R. 146).

Plaintiff's attorneys, who have shown their competence and resourcefulness throughout this case, argue that the opinion of the Court of Appeals is based solely on questions of law. That position is untenable. From a careful reading of the opinion of the Court of Appeals it is clear that that court wanted to give plaintiff another trial. Disagreement with the verdict of a jury is nothing more than *disagreement* over a question of fact. But under settled law the jury is the exclusive trier of questions of fact; and neither the trial judge nor a court of review has the right to set aside the verdict of the jury on the ground that it would have found the facts differently.

In *The Marine Insurance Company of Alexandria* v. *Young*, 5 Cranch 187 at page 190, this court said: "Can this court reverse for error in fact? Suppose we should be of opinion that the court below ought to have granted a new trial, is it not an error of fact? * * *" This court refused to grant a new trial in that case on the ground no appeal could be taken to this court from an order overruling a motion for new trial.

The only other matter considered by the Court of Appeals was instruction 33. As we showed in the petition for certiorari at pages 14 to 19, that instruction is not erroneous. It was responsive to the combined charges of malice contained in the single count of the amended complaint. A reading of that complaint will show that the cause of

action therein asserted is not divisible into several causes of action as claimed by plaintiff's attorneys on pages 16 and 17 of their brief. We reiterate that the question submitted to the jury was whether the defendant *maliciously* did the acts with which it was charged. Furthermore, the Court of Appeals did not hold this instruction improper in the light of the pleadings. What the Court of Appeals held was that this instruction and the pleadings imposed on plaintiff a greater burden of proof than would have been necessary had she elected to bring her case on another theory.

WHEREFORE, the defendant, the petitioner, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

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HERBERT C. DE YOUNG,
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September, 1951.